Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

EVELYN Z. SOMMERS. PETITIONER

V

THOMAS A. MCKINNEY. etal. RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

EVELYN Z. SOMMERS. PRO SE
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65 PP

QUESTIONS PRESENTED

1. Should state court judges whose sole objective in legal malpractice cases is to exonerate fellow members of the bar have the right to disregard the interests of the public who have been subjected to undue influence, intimidation and overreaching? Should three judges in separate courts who share this objective the right to prevail over three appellate justices who strongly backed up their opinion with case law to the contrary? Likewise, should the findings of a panel of the Disciplinary Review Board's findings of wrongdoing be disregarded?

2. In legal malpractice cases wronged members of the public seeking redress must act pro se, yet there are no rules to protect them. Should they be held to a higher standard then attorneys?

3. Does the U. S. Constitution provide a higher level of equal protection for lawyers and a lower level of equal protection for the public?

4. Can a trial court reduce the remand of 17 counts by the Appellate Court to only three issues and then can a second Appellate panel state the trial was conducted consistent with our remand instructions without even writing an opinion?

LIST OF PARTIES

( ) All parties appear in the caption of the case on the cover page

(X) All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceedings in the court whose judgment is the subject of this petition as follows.

EVELYN Z. SOMMERS
Plaintiff-Petitioner

THOMAS A. MCKINNEY
DAVID WALDMAN
MICHAEL O. RENDA
CITIZENS FIRST NATIONAL BANK OF N.J.
Defendant-Respondents

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I

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1997

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment below.

OPINIONS BELOW

(X) For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition but does not include an opinion.
(X) is unpublished.

The opinion of the Superior Court appears at Appendix B to the petition and
(X) is unpublished

The opinion of the first Appellate Court panel to review the merits appears at Appendix C to the petition and
(X) is unpublished

The opinion of the Superior Court appears at Appendix D and
(X) is unpublished

The refusal by the Supreme Court of New Jersey to grant certification appears at Appendix E to the petition and is (X) unpublished.

JURISDICTION

For cases from State courts:

The date on which the highest state court decided this case was November 24, 1997. A copy of that decision appears at Appendix E - refused certification only.

An extension of time to file the petition for a writ of certiorari was granted to and including April 25, 1998 in letter dated February 24, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C.S. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Courts have duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship in all its dimensions. U.S. for use and Ben of Lord Elec. Co. Inc., v.Titan Pacific Const. Corp. 637 F.Supp. 1556 W. D. Wash 1986.

States have a substantial interest in protecting the public from undue influence, intimidation and overreaching. Spence v. Honorable Justices of Supreme Court of Pa. 579 F.Supp. 880, affirmed 760 F.2d 261 (1984).

Under New Jersey law, to recover on a theory of legal malpractice, a plaintiff must establish the following : 1) the existence of an attorney-client relationship placing a duty of care upon the attorney; 2) the breach of such duty and 3) proximate cause. Albright v. Burns, 206 N. J. Super 625, 632, 503 A.2d 886 (App.Div.1986)

The burden demonstrating a casual connection between an attorney's negligence and his client's loss is met when the client can show that the attorney's

negligent conduct is a contributing facture in causing the loss. Lamb v Barbour 188 N.J. Super at 12 455 A2d 1122

Quoting part of statement out of context while ignoring portion that totally undermines proposition for which quote was offered, reflects reprehensible and unprofessional dereliction of duty. ABA Code of Prof. Resp. DR7-102(A)(2) DR7-106 (B)(1) ABA Rules of Prof. Conduct Rule 3.3

A "misrepresentation" amounting to actual legal fraud consists of material representation of presently existing or past fact, made with knowledge of its falsity and with intention that other party rely thereon, resulting in reliance by that party to his detriment. Jewish Center of Sussex CT. v. Whale 86 N.J. 620

The following cases deal with legal fraud:

Prosser Torts (3d ed.)(1964) S2 at 9
McCormick, Damages, S77 at 275 (1935)
Security Corp. v. Lehman Associates,Inc. 108 N.J. Super 143 (1970)
Leimgruber v. Claridge Associates, Ltd. 73 N.J. 451 (1977)

The following cases support the contention that in legal malpractice cases an expert is not re-

quired if the issues are readily understandable.

Rizzo v. Haines 520 Pa. 484
Brizak v. Needle 239 N.J. Super
Rosenberg by Rosenberg v. Cahill 99 N.J.A
2175 Lemoin Ave. Corp. v. Finco, Inc. 272
N.J. Supp. (App.Div. 1994)

Evidence is deemed "relevant" if it has any tendency in reason to prove any material fact. Rules of Evidence, rule 1(2) N.J. S2A 84A

Manieri v. Volkswagenwerk 141 N.J.Super 423.

The Fifth and Fourteenth Amendments of the United States Constitution

Matter of McKinney, supra, 139 N.J. at 388

Defendants' willful, reckless, wanton, and outrageous conduct entitles plaintiff to punitive damages. Security Corp. v.Lehman Associates Inc. 108 N. J. Super 143 (1970)

Challenges to state court decisions in particular cases arising out of judicial proceedings may only be raised on appeal to the United States Supreme Court. Schneider v. Colegio de Abogados de Puerto Rico, 670 F. Supp. 1098 (1987)

STATEMENT OF THE CASE

1. Thomas. McKinney. Esq. represented the plaintiff in the case of Sommers v. Borough of Dumont L-30448-89 in a matter regarding her employment as a tax assessor. The basis for the case was that the Borough contended that there was a flaw in their original appointment as to when the plaintiff was entitled to tenure and disputed that she was a full time employee. Litigation began when her salary was cut but not her hours. and she continued to work full time. The attorney who originally represented the plaintiff succeeded in having the Borough draw up a settlement offer which included tenure. but on a part time basis. all benefits and back pay. This was covered by a resolution with no time limit for acceptance by the plaintiff. The only issue was hours to be worked was still under negotiation. On the suggestion of a business friend plaintiff sought a second opinion since if she was entitled by law to tenure she could have full time instead of part time employment. if not. it was undisputable that she should accept the offer even if hours to be worked was not negotiate.'.

2. When plaintiff conferred with attorney McKinney he induced her to dispense with her attorney; he stated that he was very experienced in tenure and municipal employment and that the law gave her tenure. The Practice Guide copyrighted by the American Bar Association and the Bureau of National Affairs. Inc. states in part:

> Clients are entitled to trust their attorneys and since attorneys are supposed to know what they are talking about when they give a legal

opinion. clients are entitled to rely on such opinions as if they were statements of fact.

At that meeting plaintiff stated that back pay due her amounted to thousands and that her attorney had told her that he believed that on this issue she would prevail at trial. Hence it is evident that the false statements made were motivated by greed; he took 35% of the settlement on a case that was ready for trial.

3. During the six month period that he had the case he never again met with plaintiff nor did he ever prepare her for trial (which took place on one day's notice to plaintiff). On the occasions that plaintiff's son phoned McKinney, even up until shortly before the trial, he was told that tenure was assured. At the very outset of the trial McKinney told the court that he had not as yet read the prior attorney's file which he had for three months nor had he received other important tapes of council meetings which he subpoenaed two months prior. He had not pursued discovery nor called any witnesses; all he brought to court was one piece of paper showing what plaintiff had been paid and what she should have been paid. He did not prepare a case for tenure - he was unable to answer the judge's questions nor cite a single case for precedent. Any work that had been done was by an assistant but which he was totally unfamiliar. Fed. Dep. Ins. Corp. v. Long 115 F.R.D. 617; Predmore v. Rural Aid Society of West Central Ohio, 625 F.Supp.1180. He failed to advise client of settlement discussions which took place in chambers. While in later discovery by plaintiff, a letter written by the

attorney for Dumont. which stated the higher figure recommended by the judge would "undoubtedly include attorney s fees". McKinney induced the plaintiff to accept a lower figure saying that it was the one and only offer and if she did not take it she could receive nothing, falsely saying that there were witnesses who would testify that plaintiff had been told to reduce the hours she was to work. Prior to accepting the settlement offer plaintiff discussed. in the presence of her son. with McKinney his fee. It was agreed that there would be a cap of ten thousand dollars subject to a proper bill. Since plaintiff had already paid $3,500.. she stated that from the $40.000 settlement she would net $33,500. Despite the requirement in the retainer agreement for monthly bills, when the bill arrived days later it exceeded the cap by over $4.100. ignoring the fact that plaintiff had already sent him a letter recapping the fee agreement. Thereafter. McKinney s actions resulted in a public reprimand by the Disciplinary Review Board of the New Jersey Supreme Court Docket Matter of McKinney docket No. DRB 93-370 for his having deposited the settlement check without client's required signature, failing to notify client of the check's receipt. withdrawing the disputed fee and "strong-arming" client.

4. After one year of futile attempts to negotiate with all defendants. plaintiff filed a complaint - Sommers v. McKinney etal. No. BER-L-3710-92 in New Jersey Superior Court. which case dragged on for 2-1/2 years during which time the judge ignored the many motions and verbal arguments of plaintiff; permitted

defendants not to answer interrogatories for more than a year; ignored the admissions of defendants in answers to interrogatories and depositions; permitted defendants' attorneys to distort the facts; lost documents; ruled that the law required an expert in all malpractice cases and finally dismissed the case by summary judgment.

5. This dismissal was appealed to the Superior Court Appellate Division Sommers v. McKinney etal. Docket No. A-1298-94TI. which reversed 15 counts and permitted the addition of two more; only one count, punitive damages against the bank. was affirmed. At the time of verbal arguments before the Appellate Court. all three judges rebuked the attorney for the three lawyer defendants saying that she should immediately phone her principals telling them that their case was "in tatters" and that they should settle at once. This admonition was ignored. an opinion was written and the case went to trial. The opinion stated that an expert was only needed if the quality of the work was challenged.

6. The trial in Superior Court of New Jersey, Sommers v. McKinney etal. Docket No. BER-L-3710-92 began on May 28, 1996. Dispite the remand of 17 counts, at the outset of the trial the judge said only three issues had been remanded and throughout the trial constantly ruled that an expert was needed. The judge ignored RPC5.1 Responsibilities of a Partner and ruled that partners Waldman and Renda "are not policeman" and dismissed them first as witnesses and then as defendants. Despite ABA Code of Professional Responsibility DR7-102(A)(2) DR7-10-(B)(1) ABA

Rules of Professional Conduct, it was the judge, while not permitting the DRB opinion to come before the jury, read out of context from that opinion the findings of the DEC's ruling that there was no wrong doing in the deposit of the check while the DRB ruled otherwise. Nevertheless the judge ruled that "these were after the fact" and were not a part of the case. The judge refused to allow McKinney to be confronted with his answers to interrogatories and depositions which belied his testimony . While his written answers confirmed plaintiff's testimony that he had told plaintiff at their initial meeting that she had tenure (which induced plaintiff to engage his services), the judge stated, contrary to the Practice Guide copyrighted by the American Bar Association and the Bureau of National Affairs, Inc. that "he had a right to change his mind". Plaintiff produced an enacted resolution by the Borough of Dumont which granted plaintiff tenure, all benefits and back pay, but on a part-time basis; there was no time limit for acceptance by plaintiff. At trial plaintiff's original attorney, who had negotiated the settlement resolution, testified that plaintiff had never rejected the offer - she had as yet not accepted it as he was still negotiating one final point - the time schedule for hours to be worked - and up until the time that he was replaced the offer had never been withdrawn. Plaintiff testified that she consulted McKinney for a second opinion - if the law gave her tenure, she would be entitled to full time employment, if not, she would have certainly accepted the offer regardless of the time schedule since she would have continued employment indefinitely. Plaintiff testified that she met with McKinney on July 3, 1990 and as per his

instructions she dismissed her then attorney on July 5, 1990 and also advised the attorney for Dumont that her appearance for deposition, which was scheduled for the next week, be postponed . McKinney had told plaintiff that he was going on vacation - hence his retainer agreement was dated about a week later. McKinney testified that "he did not think" he was in his office on July 3, 1990 and his only proof of his statement that plaintiff had rejected the offer and that she was without an attorney was "plaintiff told me". The judge testified that since the plaintiff wrote to the attorney for Dumont requesting the postponement on July 6, 1990, it proved McKinney's testimony that plaintiff was without an attorney. In order for Dumont to withdraw the offer covered by their resolution it would have required another resolution and there was none. The lawyer for the Borough of Dumont, a witness hostile to the plaintiff, admitted that there never was a second resolution of withdrawal but "that is why we went to trial" (six months later). Regardless of McKinney's attempt to juggle dates, McKinney, if he had researched his positive statement on tenure and found it was wrong, he should have advised plaintiff to accept the settlement and she still would have had employment. Plaintiff proved a prima facie case Albright v. Burns,206 N.J. Super, 625, 632, 508 A.2d 386 (App.Div.) (1986). Lamb v. Barbour, 188 N.J.Super at 12, 455A.2d 1122. Defendant did not meet the minimum standards for lawyers: Ransburg Corp. v. Champion Spark Plug Co. 548 F.Supp.1040. ABA Code of Prof. Responsibility Canon 1 et seq. Defense did not invoke legal and factual basis for their claims. In re Chicago Midwest Donut Inc. 82 B.R. 963 , Fed. Rules of

Civil Procedure Rule 11.28 USCA. Whenever McKinney's testimony contradicted itself or was unbelievable, the judge would say "let's get on to something else." If plaintiff merely said "but" the judge would threaten to fine, yet defense lawyers were allowed to expound at length. There were countless instances throughout - plaintiff was permitted to have no notes when testifying; was forced, when ill, and despite doctor's orders, to proceed; termed relevant issues irrelevant; dismissed witnesses and not allowed to call others; conferred in chambers with three defense attorneys in absence of plaintiff warning them twice that they were being recorded (on audio and video) and then there was a fifteen minute lapse in the recording. The first Appellate panel had dismissed only one count - punitive damages against the bank since its attorney had admitted the bank's wrongdoing. However, at the trial the court permitted the attorney to exonerate the bank by a defense of ratification. Thermo Contracting Corp. v. Bank of New Jersey 69 at N.J.362. The contention was that since plaintiff had deposited the proceeds of the settlement check sent by McKinney on the day she received it, she had ratified. However, in order to ratify one must be aware of all the facts. Plaintiff initially did not know that she was a named payee; it took two weeks to obtain a copy of the settlement check from the payer and immediately protested to Citizens' main office and its Hawthorne branch which cashed the check. This defense was also repeated to the Appellate Division. The judge "made records" which are belied by the video tape. The judge only permitted the fee dispute to go to the jury. In her jury charge she stressed "credibility", which

was aimed against the plaintiff's case . but this backfired since the jury reduced the fee by 45%. If the judge had not stressed that the defendants were entitled to a fee. the reduction may have been even greater. U. S. for Use and Ben of Lord Elec. Co., Inc. v. Titan Pacific Const. Corp. 637 F.Supp. 1556(1986). Spencer v. Honorable Justices of Supreme Court of Pa. 579 F. Supp.880 Affirmed 760F.2d 261.

7. The decision of the trial court was appealed to the Superior Court of New Jersey Appellate Division. Docket No. A-7077-95T2. This time the panel of two judges consisted of Judge Long and Judge Cuff. Only a few days before oral arguments Judge Long was replaced by Judge Muir who might not have had time to review the case. However, at verbal arguments he immediately said that the prior Appellate panel had dismissed all but three issues. While plaintiff argued to the contrary, Judge Cuff. who had written the opinion of the first Appellate panel, kept nodding her head in agreement with the plaintiff and asked numerous questions which supported the plaintiff's position. A few days thereafter the decision affirming the trial court's decision was written; it stated that "an opinion would serve no precedential value."

8. On November 24. 1997 the Supreme Court of New Jersey C-484 September Term 1997. 44866 denied plaintiff's petition for certification.

9. Plaintiff is entitled to damages. loss of salary. benefits. increased social security and pension benefits. legal costs and also punitive damages.

REASONS FOR GRANTING THE WRIT

1. In New Jersey there do not seem to be cases in which litigants prevailed in their litigation against attorneys. Most of the cases were dismissed. Hence the courts of New Jersey should be made aware that litigants who have suffered damages at the hands of attorneys have a right to redress.

2. Litigants are being deprived of the rights granted to them under 42 U.S.C.A. S 1983

3. Two panels of the Appellate Court of New Jersey issued divergent decisions. The first remanded 15 plus two additional counts in its very detailed opinion. The second panel, at time of oral arguments, stated that most counts had been dismissed by the first panel - only three issues remained; refused to write an opinion and merely affirmed the verdict of the trial court.

4. At time of trial no creditable evidence was given to disprove that, but for the wrong doings of defendant, the plaintiff would have received tenure, all benefits and back pay. This was proven by the resolution itself and testimony of plaintiff's original lawyer that the offer contained therein had never been withdrawn. Hence, if not for the malpractice of defendant McKinney, plaintiff would still be employed. Since the judge was aware that plaintiff had proven a prima facie case and the jury would so find, the judge could not permit the jury to rule in order to accomplish her objective - to exonerate the defendants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Evelyn J Sommers, Pro Se.

Date: April 10, 1998

APPENDIX A

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Superior Court of N.J.
Appellate Division
A-7077-95T2

Evelyn Z. Sommers
Plaintiff-Appellant
vs.

Filing Date
Appellate Div.
Sept. 18, 1997

Thomas A. McKinney, David Waldman, Michael O. Renda and Citizens First National Bank of New Jersey, a banking corporation of the State of New Jersey with offices at 108 Harristown Road, Glen Rock N.J. 07452
Defendants-Respondents

Argued Sept. 10, 1997 Decided Sept.18,1997

Before Judge Muir, Jr & Cuff

On appeal from the Superior Court of New Jersey, Law Division, Bergen County.

Appellant Evelyn Z. Sommers argued pro se

Angela A. Iuso argued the cause for respondents Thomas A. McKinney, David Waldman and Michael O.Renda (Connell, Foley & Geisser, attorneys; Jerome M. Lynes, of counsel and on the brief, Ms. Iuso on the brief.)

Andrew J. Karas argued the cause for respondent Citizens First National Bank of New Jersey (Karas, Kilstein, Hirschklau, Feitlin & Youngman, attorneys; Mr. Karas on the brief).

PER CURIAM

Following this court's reversal of summary judgment entered in favor of defendants Thomas McKinney, David Waldman, Michael O. Renda, and Citizens First National Bank of New Jersey, plaintiff Evelyn Z. Sommers' legal malpractice and excessive fee claims were tried to a jury. At the close of plaintiff's case, Judge Marguerite Simon dismissed all legal malpractice claims against defendants McKinney, Waldman & Renda. The jury found that McKinney charged an excessive fee in the amount of $7,751.50. It also awarded $27. in damages for the bank's acceptance of a check without proper endorsements. Plaintiff appeals.

On appeal, plaintiff raises the following:

POINT I

THE COURT ERRED IN PROHIBITING THE TESTIMONY. STATING THAT AN EXPERT WAS NEEDED. AND DISTORTING THE FACTS IN REGARD TO THE RESOLUTION THAT WOULD HAVE GIVEN PLAINTIFF TENURE. ALL BENEFITS AND BACK PAY.

POINT II

THE COURT ERRED NOT ONLY IN NOT FOLLOWING THE REMAND OF THE APPELLATE DIVISION BUT ALSO IN DENYING A FAIR TRIAL.

POINT III

THE COURT ERRED IN ACCEPTING AS FACT THE EVASIVE AND UNSUBSTANTIATED ANSWERS OF DEFENDANT MCKINNEY.

POINT IV

THE COURT ERRED IN NOT PERMITTING PLAINTIFF PRO SE TO CONFRONT DEFENDANT MCKINNEY WITH HIS ANSWERS TO INTERROGATORIES AND DEPOSITIONS WHICH BELIED HIS TESTIMONY.

POINT V

THE COURT ERRED IN ALLOWING SPECIOUS AND DISTRACTING ARGUMENTS RE: SETTLEMENT DISCUSSIONS OF JANUARY 3/7 1991.

POINT VI

THE COURT ERRED IN ALLOWING SPECIOUS AND DISTRACTING ARGUMENTS ALLOWING THE DEFENSE OF THE PLAINTIFF ALLEGEDLY ACCEPTING AND BEING BOUND BY THE SOMMERS V. DUMONT SETTLEMENT TO INCLUDE HER WAVING COMPLAINTS AGAINST HER ATTORNEYS FOR ALL THOSE THINGS DONE AND NOT DONE INCLUDING THOSE HIDDEN FROM HER AND NOT AS OF THAT DATE PERPETRATED.

POINT VII

THE COURT ERRED IN FIRST DISMISSING WALDMAN AND RENDA AS WITNESSES AND THEN AS DEFENDANTS.

POINT VIII

THE COURT ERRED IN ADOPTING SPECIOUS AND DISTRACTING ARGUMENTS: THE COURT WENT TO EXTREME LENGTHS TO EMBARRASS. HUMILIATE AND DISCREDIT PLAINTIFF'S SON.

POINT IX

THE COURT ERRED IN ADOPTING SPECIOUS AND DISTRACTING ARGUMENTS ; THE COURT'S ALLOWING THE DISBARMENT OF PLAINTIFF'S SON 'AS TO MOTIVE".

POINT X

THE COURT ERRED IN ALLOWING SPECIOUS AND

DISTRACTING ARGUMENTS; SINCE THE BANK HAD ADMITTED RESPONSIBILITY THE PUNITIVE DAMAGE COUNT WAS UPHELD BY THE APPELLATE DIVISION. THE COURT NOW ALLOWED NEW DEFENSES.

POINT XI

THE COURT ERRED IN ITS TREATMENT OF THE PLAINTIFF; HARASSMENT, THREATS, AND EMBARRASSMENT.

POINT XII

THE COURT ERRED IN ADOPTING SPECIOUS AND DISTRACTING ARGUMENTS: EVEN ON ALL ISSUES THAT THE COURT RULED PERTINENT, TESTIMONY WAS IGNORED.

POINT XIII

THE COURT ERRED IN ALLOWING SPECIOUS AND DISTRACTING ARGUMENTS: ENTERTAINING MR. LYNES' STATEMENT REGARDING A TRIAL BRIEF OF THE MCKINNEY FIRM IN SOMMERS V. DUMONT.

POINT XIV

THE COURT ERRED IN ALLOWING SPECIOUS AND DISTRACTING ARGUMENTS: THE COURT LIMITS THE DECISION TO A FEE DISPUTE.

POINT XV

THE COURT ERRED IN ALLOWING SPECIOUS AND DISTRACTING ARGUMENTS: THE COURT IN ORDER TO PREVENT PLAINTIFF FROM STRENGTHENING HER POSITION DISMISSED WITNESSES DOMINIC AND LAYTON.

We have reviewed the record in this case in its entirety and we find no basis to disturb the legal rulings of the trial judge or the verdict of the jury. The trial was conducted consistent with our remand instructions. The evidence in support of the jury verdict is not insufficient. R. 2:11-3(e)(1)(b). Moreover, the legal issues raised by plaintiff are clearly without merit and an opinion would serve no precedential value. R. 2:11-3(e)(1)(E).

Affirmed.

APPENDIX B

SUPERIOR COURT OF N.J.
LAW DIV. BERGEN CTY.
DOCKET BER-L-3710-9

CONNELL, FOLEY & GEISER
85 Livingston Avenue
Roseland, New Jersey 07068
(201) 535-0500
Attorneys for Defendants,
Thomas A. McKinney, David Waldman
and Michael O. Renda

CIVIL ACTION
JUDGMENT

EVELYN Z. SOMMERS
Plaintiff,
vs
THOMAS A. MCKINNEY, DAVID WALDMAN, MICHAEL O. RENDA and CITIZENS FIRST NATIONAL BANK OF NEW JERSEY, a banking corp. of the State of New Jersey
Defendants

This matter having come on for trial before the court and a jury on May 28, 29, 30, June 3, 4, 5, 1996, with plaintiff Evelyn Z. Sommers appearing pro se, Jerome M. Lynes, Esq. and Angela A. Iuso, Esq. of the firm of Connell, Foley & Geiser, appearing on behalf of defendants Thomas A. McKinney, David Waldman and

Michael O. Renda and Andrew J. Karas, Esq. of the firm of Karas, Kilstein, Hirschklau, Feitlin & Youngman, appearing on behalf of defendant Citizens First National Bank of New Jersey, and the cause having been heard and submitted to the jury, and the court having heard the evidence and the arguments of counsel for their respective parties and of Evelyn Z. Sommers, appearing pro se, and on motion following plaintiff's case and the court having found that:

1. That the plaintiff has failed to establish a prima facie case of legal malpractice against Thomas A. McKinney

2. That the plaintiff has failed to establish a prima facie case against defendants David Waldman and Michael O. Renda; and

3. That the plaintiff has failed to introduce evidence supporting claim for punitive damages.

The remaining claim involving a fee dispute having been submitted to the jury and the jury having rendered a verdict on June 5, 1996 in favor of the plaintiff

It is on this 24th day of June, 1996

ADJUDGED AS FOLLOWS:

1.. That judgment be and is hereby entered in favor of the plaintiff, Evelyn Z. Sommers, pro se, and against defendant Thomas A. McKinney in the amount of $7,751.50 together with judgment interest;

2. That judgment be and the same is hereby entered in favor of the plaintiff. Evelyn Z. Sommers, pro se. and against defendant Citizens First National Bank of New Jersey in the amount of $27.00 said amount being included in the judgment rendered in favor of plaintiff and against defendant Thomas A. McKinney; and

3. That a copy of this judgment be served upon all counsel and Evelyn Z. Sommers. pro se. mailed by certified mail. Return Receipt Requested and by regular mail within 7 days of the date hereof.

"s/ Marguerite T. Simon"
Honorable Marguerite T.Simon.J.S.C.

The judge deleted five items which defendants attorney had included - no expert report; no misrepresentation in settlement discussions: re. full time hours : accurate bill and no mishandling of the settlement check.

C!
APPENDIX C

SUPERIOR COURT OF N. J.
APPELLATE DIVISION
A-1298-94T1

APPROVED FOR PUBLICATION
JANUARY 26, 1996
APPELLATE DIVISION
Filing Date January 26, 1996

EVELYN Z. SOMMERS
Plaintiff-Appellant
v.
THOMAS A. MCKINNEY, DAVID WALDMAN, MICHAEL O. RENDA AND CITIZENS FIRST NATIONAL BANK OF NEW JERSEY, a banking corporation of the State of N.J.
Defendants-Respondents

Argued: September 19, 1995-Decided Jan. 26,1996

before Judges Drier, A. M. Stein and Cuff.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County

Evelyn Z. Sommers, appellant, argued the case pro se

Angela A. Iuso argued the case for respondents, Thomas A. McKinney, David Waldman and Michael O. Renda (Connell, Foley & Geiser, attorneys; Robert E. Ryan, of counsel, Ms. Iuso on the brief).

Andrew J. Karas argued the cause for respondent Citizens First National Bank of New Jersey (Karas, Kilstein, Hirschklau, Feitlin & Youngman, attorneys; Mr. Karas on the brief).

The opinion of the court was delivered by

CUFF, J.A.D.

In this action for legal malpractice and fraud, plaintiff Evelyn Sommers appeals from separate orders which granted summary judgment in favor of all defendants. This appeal has its roots in prior litigation between plaintiff and her former municipal employer. Plaintiff Evelyn Sommers appeals from the dismissal of her complaint which asserted claims of legal malpractice and fraud against defendant Thomas A. McKinney, and his law partners, David Waldman and Michael O. Renda, and negligence and fraud against defendant Citizens First National Bank of New Jersey. Because defendant bank concedes that it improperly negotiated the settlement check without all necessary endorsements, and because plaintiff demonstrated that there are genuine issues of material fact concerning breach of the duties owed to her by her attorney, and in this case expert testimony is not required to establish the duty owed to her by her attorney, we reverse and remand for further proceedings consistent with this opinion.

In 1984, plaintiff was appointed tax assessor of the Borough of Dumont for a four-year term. When her term expired on June 30, 1988, she continued to work, despite disputes concerning her hours and rate of pay.

However, when her pay was cut, she commenced a prerogative writ action to affirm her tenured status and to recover back pay.

She was represented by another law firm in that action until that firm recommended that she accept the Borough's "final" settlement offer. Pursuant to the terms of that offer, the Borough was prepared to acknowledge her tenured status and pay $19,375. in back pay. Plaintiff sought a second opinion from defendant McKinley, and on the strength of McKinney's advice that she was entitled to tenure as a matter of law and additional back pay, she discharged her initial attorney and retained McKinney. Approximately six months latter, the matter was settled during trial. Plaintiff received $40,000, but she surrendered her claim for tenure.

When plaintiff retained McKinney, she paid a $3,500. retainer. Plaintiff claims that the money was to be held in trust, and McKinney could draw against this fund nobly after plaintiff received and approved a monthly itemized bill. It is undisputed that no bills were submitted. However, four days after the settlement was placed on the record she was presented with a bill for services. The total bill for services was $14,164 less the $3,500 retainer plus $2,544.30 for legal services due her former lawyer. The outstanding balance was $10,664.

Plaintiff asserts that she visited McKinney on February 14, 1991 to review the file and contest the bill. On February 15, 1991, plaintiff presented McKinney with a letter in which she informed him that the bill was in dispute and directed him to

contact her when the settlement funds were received.

Despite this notice, McKinney did not notify plaintiff when he received the settlement check on February 21, 1991. The check, made payable to "E. Sommers and T.A. McKinney Attorney Trust Account" was deposited by McKinney with his sole endorsement. Defendant bank accepted the check, although it lacked plaintiff's endorsement.

McKinney withdrew his fee and sent a check to plaintiff for $26,791.70. Plaintiff objected to McKinney concerning his action and protested to defendant bank. On March 15, 1991, McKinney sent a letter to plaintiff in which he offered to place the disputed fee in a trust account if plaintiff returned the funds disbursed to her. Plaintiff not only objected to McKinney concerning his suggested solution but also filed a complaint with the Fee Arbitration Committee. Recognizing that this committee could not address the ethical issue raised by McKinney's action, she withdrew the fee complaint and filed a complaint with the District Ethics Committee. McKinney was eventually publicly reprimanded for his conduct. See Matter of McKinney, 139 N.J. 388 (1995). The Supreme Court also referred the fee dispute to arbitration.

Meanwhile, plaintiff commenced this action pro se against McKinney, his law partners, and the bank. The gravamen of her complaint against McKinney lies in his handling of her case against the Borough of Dumont and McKinney's subsequent mishandling of the settlement proceeds. Her complaint against McKinney's law partners is founded on their

relationship to him and their failure to intercede and rectify the situation. Her complaint against the bank centers on their acceptance of the check despite the absence of the requisite endorsements, contrary to the law governing instruments payable to two or more persons. See N.J.S.A. 12A:3-116(b).

On March 4, 1994, plaintiff's complaint for legal malpractice against McKinney and his partners was dismissed on their motion for summary judgment predicated on plaintiff's failure to file an expert report. In an opinion dated September 15, 1994, another judge dismissed the remaining counts which asserted intentional, unethical, criminal and fraudulent conduct against McKinney and his partners for which plaintiff sought punitive damages. Having previously refused to disturb a summary judgment order which had dismissed the legal malpractice claims, the motion judge characterized the remaining claims against McKinney and his partners as "a fee dispute and nothing more." The motion judge also granted summary judgment in favor of the bank finding that plaintiff had failed to show that the bank did anything "willfully, wantonly or intentionally to harm the plaintiff."

The legal malpractice claim against McKinney flows from his representation of her in the Sommers v. Dumont litigation. She alleges that 1) the case was inadequately prepared, 2) McKinney failed to communicate more favorable settlement offers to her, and 3) McKinney misrepresented discussions in chambers regarding the extent of Dumont's proofs on

the tenure issue. Plaintiff asserts that these acts by McKinney not only violated his obligations to her but also induced her to accept a less advantageous settlement. This claim was dismissed for want of an expert report. To evaluate the dismissal of this claim properly, we must examine the pleadings and discovery at the time this order was entered.

It is undisputed that when plaintiff was represented by her initial attorney a settlement was proposed, after which plaintiff consulted McKinney. In answers to interrogatories, McKinney stated, "at that time, based upon the facts that the plaintiff had given me and as they appeared in the documents, I indicated that the plaintiff had a valid claim for tenure." It was on this basis that plaintiff retained McKinney and a substitution of attorney was filed.

Eventually, the matter was called for trial. The trial judge conferenced the matter in chambers with McKinney and the Borough attorney. Plaintiff and McKinney related that the judge opined that without legal proof of plaintiff's right to tenure, the tenure claim was probably without merit. McKinney advised plaintiff that the Borough was prepared to present witnesses who would testify that plaintiff had been instructed not to work the hours that she had worked and for which she was seeking compensation. McKinney advised her that this testimony could undercut her back pay claim. Based on his advice, plaintiff settled her claim against the Borough for $40,000 without recognition of tenure. This amount included the time she had worked between the time of the initial settlement offer, which included a recognition of her tenure, and the eventual settlement.

In this action, plaintiff asserts that she was compelled to accept this settlement due to McKinney's lack of preparation and misrepresentation to her of the state of the Borough's case. Specifically, she claims that the trial judge was not persuaded concerning her tenure status because McKinney had failed to cite any legal authority in support of her tenure claim. In support of this claim, plaintiff prepared an inventory of the Sommers v. Dumont file maintained by McKinney which does not even contain a trial brief.

Furthermore, she asserts that a letter from the Borough attorney to the Borough, apparently received during discovery, refutes McKinney's representations concerning the strength of the Borough's proofs on the back pay issue. In this letter dated the day after the conference with the trial judge, the Borough attorney stated:

> (I) have been unable to find any proof that Ms. Sommers was directed to reduce her work hours after the moneys for the reassessment program were withdrawn in November of 1988. Similarly, I have been unable to find any evidence that Evelyn Sommers did not work a minimum of 32-1/2 hours entitling her to additional moneys.
>
> * * *
>
> Recognizing that there is no evidence Ms. Sommers was directed to reduce her hours, I believe that there is a strong probability that plaintiff will recover money damages.

We recognize that the obvious difference concerning the proofs able to be presented by the Borough does not establish that the Borough acknowledged the weakness of its back pay case in McKinney's presence. but the Borough's position was not explored in discovery. An issue of fact certainly existed regarding the information known to McKinney and transmitted to plaintiff.

Having identified several issues of fact. it is now necessary to determine if these disputed facts are material. i.e. whether a resolution of those factual

disputes in plaintiff's favor would entitle her to judgment as a matter of law. Brill v. Guardian Life Id. Co. of Am., 142 N.J. 520, 529 (1955). The motion judge granted summary judgment in favor of McKinney and his partners because Sommers had failed to produce an expert to establish the standard of care owed by McKinney to Sommers and any breach of that standard of care.

An attorney is obligated to exercise the degree of reasonable knowledge and skill that lawyers ordinary ability and skill possess and exercise. St. Pius X House of Retreats v. Diocese of Camden, 88 N.J. 571, 588 (1982). Necessary steps to the proper handling of a case include careful investigation of the facts of the matter. formulation of legal strategy, filing of the appropriate papers, and maintenance of communication with the client. Ziegelheim v. Apollo, 128 N.J. 250, 261 (1992).

Legal malpractice is negligence relating to an attorney s representation of a client. In order to

establish malpractice, the plaintiff must demonstrate: 1) the existence of an attorney-client relationship creating a duty of care upon the attorney; 2) that the attorney breached the duty owed; 3) that the breach was the proximate cause of any damages sustained; and 4) that actual damages were incurred. Albright v. Burns, 206 N.J.Super. 625, 632 (App. Div. (1986). The client bears the burden of proving by a preponderance of competent credible evidence that injuries were suffered as a proximate consequence of the attorney's breach of duty. Lieberman v. Employers Inc. of Wausau, 84 N.J. 325, 342 (1980). This burden is not satisfied by mere conjecture, surmise or suspicion. 2175 Lemoine Ave. v. Finco, Inc. 272 N.J. Super. 478, 488 (App. Div. 1994).

Expert testimony is required in cases of professional malpractice where the matter to be addressed is so esoteric that the average juror could not form a valid judgment as to whether the conduct of the professional is reasonable. Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982); see also Rosenberg v. Cahill, 99 N.J. 318, 325 (1985) (chiropractor); Buckelew v. Grossbard, 87 N.J. 512 (1981) (physicians); Walker v. Rogge, Inc. v. Chelsea Title & Guar. Co., 222 N.J. Super. 363, 374-76 (App. Div. 1988) (surveyors), aff"d in part, rev'd in part on other grounds, 116 N. J. 517 (1989). However, the facts of a given case may be such that a layperson's common knowledge is sufficient to permit a finding that the duty of care has been breached. Klimko v. Rose, 84 N. J. 496, 503-04 (1980).

In rare cases, expert testimony is not required in a legal malpractice action where the duty of care to a

client is so basic that it may be determined by the court as a matter of law. Brizak v. Needle,239 N.J.Super. 415, 429 (App. Div.) (failure to conduct investigation into personal injury claim resulting in untimely medical malpractice suit), certif. denied, 122 N.J. 164 (1990); see also Stewart v. Sbarro, 142 N.J.Super. 581, 591 (App. Div.)(failure to execute and record bond and mortgage), certif. denied, 72 N.J. 459 (1976); Fuschetti v. Bierman, 128 N.J. Super. 290, 295 (Law Div. 1974) (failure to file suit before running of statute of limitations). Further, expert testimony may not be necessary to establish proximate cause in every legal malpractice case, particularly where the causal relationship between the attorney's legal malpractice and the client's loss is so obvious that the trier of fact can resolve the issue as a matter of common knowledge. 2175 Lemoin Ave. Corp., supra, 272 N.J. Super. at 490 (expert testimony necessary for trial of legal malpractice arising from complex commercial transaction.) On the other hand, if the adequacy of an investigation or the soundness of an opinion is the issue, a jury will usually require the assistance of an expert opinion. Aldrich v. Hawrylo, 281 N.J.Super. 201, 214 (App. D iv.(1995)[1]

Stripped to its essentials, plaintiff asserts that she accepted a settlement offer far inferior to one previously tendered because her attorney

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[1] Counts 18 and 19 of plaintiff:s proposed amended complaint asserted a legal malpractice claim specifically related to McKinney's alleged misrepresentation of the state of the Borough's proofs and its ability to defend her back pay claim. Although probably encompassed in plaintiff's prior pleadings, the motion to allow the filing of an amended complaint should have been granted to allow a full exposition of plaintiff's claim against McKinney.

inadequately prepared the case, failed to submit a legal argument to support her tenure claim and misrepresented the state of the case to her. These issues do not require a jury to speculate whether

McKinney selected the appropriate authorities to advance plaintiff's legal position or to evaluate McKinney's judgment in recommending a settlement offer to her. Rather plaintiff asserts that no work was done to advance her case and that McKinney knew the shortcomings of the Borough's case but misrepresented the strength of its defense to her back pay claim to induce her to settle the case and collect his fee.

Having undertaken to represent her, McKinney owed a duty of absolute good faith and loyalty to Sommers. Matter of Stein, 97 N.J. 550, 563 (1984). He was obliged to prepare her case for trial. Ziegelheim, supra, 128 N.J. at 261. Once settlement discussions commenced, McKinney was obligated to communicate all offers to her. See, e.g., Yeomans v. All State Ins. Co., 121 N.J. Super. 96, 102 (Cty. Ct. 1972), aff'd, 130 N.J. Super. 48 (App. Div. 1974). He was also obliged to give her a full and accurate assessment of the case in support of and in defense of her claims. In re Loring, 73 N.J. 282, 290 (1977).

We conclude that Sommers was not required to have an expert opine that McKinney should have briefed an issue and that the failure to do so was a breach of that duty to plaintiff. Similarly, Sommers was not obliged to have an expert opine that McKinney was required to report the settlement discussion accurately and recommend a disposition of

the case based upon an accurate rendition of each party's positions. Furthermore, Sommers was not required to produce an expert to opine that, if she had been told that the town had no defense to her back pay claim, she would have changed her settlement position. Therefore, we conclude that the motion for summary judgment in favor of McKinney and his firm should not have been granted.

Plaintiff also founds her legal malpractice claim against McKinney and his partners on the manner in which he disbursed the settlement proceeds and his attempted resolution of the fee dispute. Characterizing this aspect of plaintiff's claim as nothing more than a fee dispute, the motion judge granted defendant's motion for summary judgment.

In a sense, the motion judge correctly observed that this case involves a dispute regarding the amount of a legal fee. However, the fee dispute is also a constituent part of plaintiff's entire negligence claim against McKinney. Plaintiff's claim is actually in two parts: 1) McKinney did little, if any, work on her case, and 2) she was charged for work inadequately or never done.

By failing to notify plaintiff that he had received the settlement funds and by disbursing those funds when he knew the fee was disputed, McKinney was publicly reprimanded. Matter of McKinney, supra, 139 N.J. at 388. Plaintiff argues that the finding that McKinney violated R.P.C. 1.15(b) and (c) establishes part of her claim of legal malpractice against McKinney and obviates the need for an expert report to support her negligence claim.

Violation of the rules of professional conduct do not per se give rise to a cause of action in tort. Petrillo v. Bachenberg, 263 N.J. Super.472, 483 (App. Div. 1993), aff'd, 139 N.J. 472 (1995); Albright, supra, 206 N. J. at 634; but see Baxt v. Liloia, 281 N. J. Super. 50, 61 (App. Div.) (Drier, P.J.A.D., concurring) (breach of ethical rules provides a legitimate basis for a civil action against an attorney), appeal after remand, 284 N.J. Super. 221 (App. Div. 1995) However, because the ethical standards set the minimum level of competency to be displayed for all attorneys, violation of the rules can be considered evidence of malpractice. Albright, supra, 206 N.J. Super. at 634
Lamb v. Barbour , 188 N. J.Super. 6, 12 (App. Div. 1982), certif. denied, 93 N. J. 297 (1983). Moreover, even when plaintiff establishes that rules of conduct have been violated, she must also establish proximate cause. Albright, supra,206 N.J.Super. at 635; Lovett v. Estate of Lovett, 250 N.J. Super. 79, 98 (Ch.Div. 1991).

Plaintiff's claim against McKinney goes beyond the manner in which he disbursed the settlement proceeds. She claims that due to his method of disbursing the proceeds she has been prevented from challenging the excessive nature of his fee. She asserts that she has been charged for work that was not done or inadequately performed. Further, she contends that this lack of or inadequate performance has caused her to receive lower than expected benefits from her negotiated settlement with her former employer.

To the extent that plaintiff challenges the quality of the work done on her behalf, the motion judge properly dismissed this claim because of her failure to

submit an expert report. Brizak, supra, 239 N.J. Super. at 432. However, plaintiff is not required to produce an expert to announce that an attorney may not charge for work that has not been performed or to advise the jury that a trial brief does not exist. Furthermore, it is not necessary for an expert to establish the causal connection between a charge for services not performed and lesser proceeds to the plaintiff.

Finally, we address the dismissal of counts fifteen and sixteen of the complaint against defendant bank. Count fifteen alleges that the bank wrongfully allowed McKinney to deposit and draw on that deposit without plaintiff's endorsement and refused to take any measures to remedy the error. Count sixteen alleges that this conduct by the bank was intentional and malicious.

A negotiable instrument payable to joint payees not in the alternative may not be negotiated without the endorsement of both payees. N.J.S.A. 12A:3-116(b). Payment of a draft or check with a missing endorsement is equivalent to a forgery and constitutes conversion against the non-signing payee. Mandelbaum v. P & D Printing Corp. 279 N.J. Super. 427, 432 (App.Div. 1995); Humberto Decorators Inc.v. Plaza Nat'l. Bank, 180 N.J. super. 170, 174 (App. . Div.. 1981); Salsman v. National Community Bank of Rutherford, 102 N. J. Super. 482, 492 (Law Div. 1968), aff'd. 105 N.J. Super. 164 (App. Div. 1969)

The payee may assert a cause of action for conversion against a drawee or payor bank. See Mandelbaum, supra, 279 N.J. Super. at 432; Gast v.

American Casualty Co. 99 N.J. Super. 538, 542 (App. Div. 1968). The intended payee may also assert a claim against the depository bank for payment of an instrument with a missing or forged endorsement. Mandelbaum, supra, 279 N.J. Super. at 438-39; see also knesz v. Central Jersey bank & Trust Co. of Freehold, 97 N.J. 1, 21-22 (1984). Defendant bank was both the drawee and the depository bank.

Defendant bank concedes that it improperly deposited the settlement check and that it is liable to plaintiff. Therefore, the order granting summary judgment on count fifteen in favor of defendant bank is reversed. We affirm the dismissal of count sixteen. This count seeks punitive damages; however, plaintiff provided no facts to support a finding of intentional misconduct or malicious conduct by defendant bank.

The orders dismissing all claim against defendants McKinney and his law firm are reversed; the order dismissing count 16 is affirmed. The matter is remanded to the Law Division for further proceedings consistent with this opinion.

APPENDIX D

Not for publication without the approval of the Committee of Opinions

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - BERGEN CTY.
Docket No. BER-L-003710-92

OPINION

EVELYN Z. SOMMERS
Plaintiff,
v.
THOMAS A. MCKINNEY, DAVID WALDMAN, MICHAEL O. RENDA AND CITIZENS FIRST NATIONAL BANK OF NEW JERSEY, a banking corporation of the State of New Jersey with offices at 208 Harristown Road, Glen Rock, N. J. 07452
Defendants

DECIDED: September 15, 1994

Evelyn Z. Sommers, Plaintiff Pro Se

Angela A Iuso for defendants Thomas McKinney, David Waldman and Michael O. Renda (Connell, Foley & Geiser, attorneys)

Seymour M. Karas for defendant Citizens First National Bank of New Jersey (Karas, Kilstein, Kopf & Youngman, attorneys)

FITZPATRICK, J.S.C.

This matter comes before the Court by way of a motion filed by the plaintiff, pro se, and cross motions filed by the defendants. In addition, the defendants McKinney, Waldman and Renda (McKinney) have filed a separate motion to dismiss all counts alleging punitive damages.

The court will first deal with plaintiff's motion for summary judgment on Counts 6, 9, 12, 15 and 16 of the complaint; McKinney's cross-motion to dismiss Counts 6, 9, 12 and 15 and defendant Citizens First National Bank's (Citizens' cross-motion to dismiss Counts 15 and 16.

By way of background, the plaintiff filed a Complaint against the defendants McKinney and Citizens alleging professional negligence and fraud. In 1990 and 1991 the plaintiff represented by the defendant McKinney was involved with the Borough of Dumont in a dispute over his tenure and work hours. The matter was assigned to the Honorable Martin Kole and prior to the commencement of the trial, the matter was settled for a total of $40,000. The terms of the settlement were placed on the record and advised the Court that she was doing so voluntarily and with full knowledge of the terms of the settlement.

The trouble began when Dumont issued the settlement draft made payable to Ms. Sommers and Mr. McKinney. McKinney, instead of having Ms. Sommers endorse the check, stamped the back of the check with the firm s trust account stamp and

deposited the check in the account. Thereafter, he issued Ms. Sommers a check after deducting his legal fees and costs. The negligence and malpractice counts of the Complaint were previously dismissed by Judge Doyne, leaving the counts which are the subject matter of this motion, remaining.

Count 6 alleges that defendant McKinney, in depositing the check, did so intentionally, unethically, and criminally, with intent to defraud. Paragraph 3 of the Count states that McKinney agreed to redeposit his fee into the account if plaintiff would return the check sent her.

Count 9 alleges that the defendant Waldman, as a partner of McKinney, was celled upon to rectify the question of the check being deposited and thus assisted and shared in the wrongful act.

Count 12 alleges the same allegations as Count 9, however, are directed to the defendant Renda.

Count 15 alleges that Citizens refuses to do anything to redress the wrongful act of the check being accepted for deposit.

Count 16 alleges that the acts of Citizens were willful, wanton and intentionally done to cause harm to the plaintiff.

Giving the plaintiff all of the necessary and favorable inferences as required in a motion of this nature, the Court can find no question of fact in which to sustain the plaintiff's cause of action.

In its present posture, the matter before the Court is a fee dispute and nothing more. The Court has previously, on the record, and will again describe McKinney's action as "stupid", however, that stupidity does not rise to the level of fraud as being punitive. The plaintiff had a remedy before the Fee Arbitration Committee, but after filing her complaint, she chose to voluntarily withdraw same. In the same fashion, there is nothing to show that the Citizens Bank willfully, wantonly or intentionally did anything to harm the plaintiff.

In Berg v. Reaction Motors Div., 37 N.J. 396 (1962), Justice Jacobs, citing Professor McCormick, states:

> ".....In order to satisfy the requirement of willfulness or wantonness there must be a positive element of conscious wrongdoing .....that the requirement may be satisfied
>
> upon a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences."

In the instant case, there can be no question that the defendant McKinney and the firm were entitled to a fee. It is quite clear from the documents submitted that Mr. McKinney and Ms. Sommers did not at the end have a harmonious relationship and McKinney, to protect his fee, deducted same without any reasonable basis to hold that the defendants, both the attorneys' and the Bank's actions, were willful or wanton.

Accordingly, the defendant McKinney's and the defendant Citizens' motion dismissing Counts 6, 9, 12, 14 and 16 will be granted, as will the defendant McKinney's motion to dismiss the claim for punitive damage. The plaintiff's motion is denied.

"s/ Patrick F.S. Fitzpatrick"
Patrick F.S.Fitzpatrick, J.S.C.

Dated: September 15, 1994

E)

APPENDIX E

SUPREME COURT OF NEW JERSEY
C-484 SEPTEMBER TERM 1997
44,866

ON PETITION FOR CERTIFICATION

EVELYN Z. SOMMERS
Plaintiff-Petitioner
v
THOMAS A. MCKINNEY, et al
Defendants-Respondents.

Stephen W.Townsend.
Clerk.
Superior Court

To the Appellate Division.

A petition for certification of the judgment in A-7077-95 having been submitted to this Court, and the Court having considered the same:

It is ORDERED that the petition for certification is denied, with costs.

Witness, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 21st day of November, 1997.

STEPHEN W. TOWNSEND
Clerk of the Supreme Court

(certified)

APPENDIX F

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-370

IN THE MATTER OF THOMAS A. MCKINNEY AN ATTORNEY AT LAW	Decision and Recommendation of the Disciplinary Review Board

Argued: April 20, 1994

Decided: September 27, 1994

Arnold L. Stadtmauer appeared on behalf of the District XI Committee.

Thomas P. DeVita appeared on behalf of respondent.

To the Honorable Chief Justice and Associated Justices of the Supreme Court of New Jersey.

This matter was originally before the Board on a recommendation for private reprimand filed by the District XI Ethics Committee ("DEC"), which recommendation the Board elected to treat as a recommendation for public discipline. The formal complaint, as amended, charged respondent with violations of RPC 1.15(b) and of Matter of Advisory Committee on Professional Ethics Opinion 635, 125 N.J. 181 (1991) (failure to promptly notify client of receipt

of funds.), RPC 1.15(c) (failure to segragate funds in which both the lawyer and the client claim an interest) and In re Stern, 92 N.J. 611 (1983) (failure to deposit retainer into trust account.

Respondent was admitted to the New Jersey Bar in 1979. He has no previous disciplinary history.

In or about January 1990, Evelyn Sommers ("grievant") retained the services of the law firm of Andora, Palmisano and Geaney to represent her in an action against her then employer, Borough of Dumont; at some time during the Andora firm's representation of grievant, a settlement offer was made, which that firm considered to be both reasonable and optimal under the circumstances. Grievant, however, was dissatisfied with the offer and decided to seek a second opinion.

Grievant first consulted respondent on or about July 11, 1990 and decided to retain his services. She subsequently signed a retainer agreement (Exhibit J-1) and forwarded respondent a $3,500. retainer check (Exhibit J-2). The retainer agreement dated July 11, 1990, provided in relevant part:

> Our fees will be computed on an hourly basis for all time actually expended by attorneys and paralegal assistants. Time charges are made for time spent on items like conferences and telephone calls with you and other individuals, legal research, review of documentary materials, preparation and drafting of legal documents, correspondence and memoranda, and

> travel time. Billing will be made within thirty (30) days of its rendering. I anticipate that I will be the attorney principally responsible for legal representation of your matter. Unfortunately, litigated matters cannot be accurately estimated with respect to the time that will be involved in the resolution by an attorney . This difficulty arises as a result of the difficulty and diversity of issues that may be presented. Because of this difficulty in estimating the time involved, we are requesting a retainer of $3,500. This retainer does not represent a maximum nor a minimum amount which you will be charged but merely provides a fund against which we may draw. (Emphasis supplied (Exhibit J-1 at 1)

Grievant printed the words "please issue detailed bills and itemized estimates" below her signature, at the time that she executed the retainer agreement.

During her testimony before the DEC, grievant admitted that respondent never specifically told her that he would deposit the retainer into his trust account and would withdraw his fees only after she received and approved monthly billings from him. Nevertheless, she testified, that is how she interpreted the retainer agreement and that, in her opinion, was the only reasonable interpretation of the agreement. T24, 65-67. On or about January 3, 1991, grievant's case was called to trial. After two days of hearing, both of which, according to grievant, did not appear to

proceed well. the Borough of Dumont offfered a settlement of $40,000. Grievant testified that respondent conveyed this offer to her. in her son's presence. on January 4. 1991. At that time. respondent spoke with the two outside the courtroom and urged grievant to accept the settlement. Grievant testified that. while she was not satisfied with the offer. she agreed to accept it only after she determined that she would net $33,500. out of the proceeds. She based this determination on that conversation with respondent regarding the amount of his fee. According to grievant. in answer to her question. respondent advised he that his fee would be $10,000. Grievant believed that statement to mean that respondent's total fee would be $10,000. Since she had already paid him a $3,500. retainer. she mentally subtracted that amount from $10,000. figure quoted. subtracted the remainder from the gross settlement of $40,000. and said to respondent "out of $40,000. that means I will net $33,500." T37. While grievant admitted that respondent indicated. at that point. that he had not yet figured out his exact fee. she maintained that he never contradicted her statement that she expected to net $33,500. from the settlement. T37-39. 75-76. Grievant testified that. because she had not. up to that point. received any interim billings from respondent. she was shocked to learn that there would be an additional fee beyond the initial retainer. because she believed that the case was essentially ready for trial when she retained respondent. she assumed that respondent had not sent interim bills because any charges for additioal work were minimal in both time and nature. She. therefore. had not pressed him for interim billings. although she viewed

them as required by the retainer agreement.

All parties returned to the courthouse the following Monday, January 7, 1991, in order to place the terms of the settlement on the record. Grievant testified that respondent did not make any mention of the amount of his fee on the record, in spite of her son's specific requests that respondent do so. It should be noted that, despite grievant's asserted dissatisfaction with the terms of the settlement, which she viewed as a direct result of respondent's lack of preparation and knowledge of the relevant law, at no time did she voice her dissatisfaction on the record. In fact, in response to a specific question, she testified in court that she was satisfied with respondent's services. Exhibit J-13 at 3. At the DEC hearing, however, grievant claimed that her testimony in court that she was satisfied with respondent's services was not true. She explained that that testimony was essential in order to accomplish the settlement.

On or about January 9, 1991, grievant wrote to respondent, recounting the terms of the settlement agreement. In that letter, grievant advised respondent that her agreement to the settlement terms was based upon his advice that his "bill for services would be very close to ten thousand dollars less the three thousand five hundred dollars already paid....." Exhibit J-4. After she forwarded that letter, grievant received respondent's one and only bill. Exhibit J-3. That bill, dated January 7, 1991, showed a balance due, in addition to the initial retainer, in the amount of $10,664. Grievant testified that she was utterly shocked by reapondent's bill, as it was far more that she had expected. She, therefore, wrote to

him again, on or about February 8, 1991. In that letter, she stated: "I have several questions regarding your bill... and I would like to speak to you at your earliest convenience. I would appreciate an appointment so that this matter can be discussed." Exhibit J-6.

Thereafter, on or about February 14, 1991, grievant went to respondent's office by appointment, accompanied by her son. She advised respondent that she was dissatisfied , presumably with his bill, and asked to review her entire file. She testified that she reviewed what appeared to be a rather sparse file consisting mainly of form letters and that she pointed out to respondent that the documentation she reviewed did not appear to support his bill. While it is not clear whether grievant actually confronted respondent on any particular discrepancy, she testified, for example, that she found it unbelievable that respondent could or would have spent eleven hours on one particular day (January 3, 1991) working on her matter. (Respondnet pointed out that this was a trial day and included trial preparation time.) In addition, she disputed that respondent spent 3.2 hours in a meeting with her on December 3, 1990; she contended that the meeting lasted only fifteen minutes. In short, both grievant and her son accused respondent of "padding" his time and asked him to reconsider his bill. She testified that respondent replied that no one had ever questioned the accuracy of his billing before and that he would not reconsider the amount of his fee. Despite her dissatisfaction with respondent's fee, grievant signed a release (Exhibit J-7) on that day.

The following day, February 15, 1991, grievant again wrote to respondent. Exhibit J-8. In that letter grievant specifically requested that respondent notify her of the receipt of the settlement funds and continued to express "concern" over respondent's billing, as well as over his apparent intent to honor grievant's prior attorney's "claim for fees." In the closing sentence of her letter, grievant again requested that respondent review the file and "advise us of a fair basis upon which we can settle (your) billing in this matter." Id. Following grievant's February 15, 1991 letter, respondent sent her a breakdown sheet (Exhibit J-10), dated February 27, 1991 along with a net check in the amount of $26,791.70 (the remainder of the gross settlement after the deduction of costs and fees.. A review of the breakdown sheet discloses that respondent deducted from the settlement proceeds the amount of $10, 664. which represented the full amount of the disputed bill. Grievant's receipt of this net check was her very first notice that respondent had received the settlement funds. A review of the settlement check from the Borough of D umont (Exhibit J-7) disclosed that it was made payable to both "E>Sommers & T.A.McKinney Attorney Trust Account". The back of that cancelled check shows respondent's office stamp for deposit into his trust account. No handwritten endorsement appears on the check.

Grievant testified that, although she attempted to telephone respondent and/or his partners on many occasions after she received the net check and the breakdown statement, she received no return calls. Subsequently, grievant received a letter from

respondent, dated March 15, 1991 (Exhibit J-11) acknowledging grievant's "concern" over his failure to obtain her signature on the settlement check. In that letter, respondent apparently took the position that he would deposit the disputed funds into a non-interest bearing trust account, if grievant would agree to return the net proceeds of the settlement to be held in that sme trust account, pending the outcome of "the fee arbitration." Id. See also T189-190. (It is not clear whether an actual demand for fee arbitration had been filed by that date or whether respondent had anticipated that action).

Grievant again wrote to respondent on or about March 18, 1991. Exhibit J-12. In that letter, grievant continued to voice her unhappiness with respondent's bill, as well as her concern over respondent's deposit of the settlement check without first obtaining her signature. She further demanded that respondent provide her with a status of the "disputed balance of the settlement check". That letter was grievant's last communication with respondent.

Grievant's son, Charles Sommers, also testified before the DEC. Since Mr. Sommers was, at one time, a New Jersey licensed attorney, he helped his mother with questions she may have had or letters she wrote. His testimony corroborated his mother's.

Respondent also testified at the time of the DEC hearing. He took the position that his retainer agreement did not require him to hold grievant's retainer in his trust account and to withdraw his fees therefrom only after approval. Respondent

interpreted the agreement - and specifically the language referring to "a fund against which (he) may draw" to mean that grievant would be entitled to a $3,500. credit against the final bill. Although respondent admitted that the retainer reqquired him to issue interim bills every thirty days, he maintained that his failure to do so was an oversight and that, had grievant prompted him to issue an interim bill, he could have done so easily by looking his time up in his computer. Respondent admitted that grievant continued to dispute his bill, at least to the extent of the retainer ($3,500.) both when he received the settlement check and when he issued the net proceeds check to her. He added, however, that he never considered holding at least that portion of his fee separately and viewed grievant's stance with regard to his final billing as both a change in position from their original agreement and an outright fabrication.

Lastly, respondent testified that when he received grievant's settlement check, it was his office procedure to stamp the check or draft for deposit into his trust account, without the client's endorsement. To have the client come to the office simply to endorse the draft was, in his opinion, a waste of time for the client. Respondent further testified that this is no longer his practice

The DEC found respondent guilty of a "technical" violation of RPC 1.15(b) for his deposit of the settlement check to his trust account without first notifying his client of the receipt of the settlement

proceeds. The DEC. however, concluded that respondent's failure to obtain grievant's endorsement on the settlment check did not in itself, constitute an ethics violation at the time of its occurrence. The DEC further found that the retainer agreement did not explicitly or clearly require respondent to maintain the funds in a separate account and that, therefore, his conduct in depositing them into his business account did not violate the principles set forth in In re Stern, 92 N.J. 611 (1983). As noted earlier, the DEC recommended that respondent be privately reprimanded for his ethics infactions.

It should be noted that, although grievant raised several issues not charged in the complaint, such as the quality of respondent's representation and the reasonableness of his fee, the DEC declined to consider those issues. The DEC considered those issues to be more properly the subject of a civil action (then pending) and/or a fee dispute.

CONCLUSION AND RECOMMENDATION

Following an independent de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence. The Board also agrees with the DEC's finding that respondent's deposit of the general retainer in his business account did not violate In re Stern, Supra 92 N.J. 64 (1983). Stern requires general retainers to be placed into the trust account only where there is an explicit agreement with the client that the retainer will be separately maintained. In this case, the

language of the retainer agreement itself cannot be read to impose such a requirement. In addition, grievant admitted that she had no conversation with respondent about the retainer at the time she signed the agreement. The Board, therefore, agrees with the DEC's recommendation that this charge be dismissed.

The DEC's findings that respondent violated RPC 1.15(b) and RPC 1.15(c) both for having failed to notify grievant of the receipt of the settlement funds and for having disbursed to himself funds he knew to be in dispute, are fully supported by the record. There is no doubt that respondent knew that grievant continued to dispute the amount of his fee, at least to the extent of the $3,500. retainer amount, both at the time that he issued grievant a net check and at the time that he received and deposited the settlement check. Indeed, respondent admitted this knowledge before the DEC. Yet, he never even considered holding the disputed portion of his fee in escrow. Instead, he unilaterally determined that grievant's disagreement with his fee was both unreasonable and based upon fabrication. He, therefore, disbursed the funds to himself. Such action clearly violated RPC 1.115(c) which requires an attorney to hold disputed funds separately pending a resolution of the controversy with the client. Curiously, respondent followed the procedure set forth in RPC 1.15(c) with regard to grievant's prior attorney's fee. Respondent held those disputed funds in his trust account until grievant was able to resolve her fee dispute with her prior attorney. Respondent's failure to follow that same procedure with respect to his own fee was obviously the product of self interest.

The DEC s characterization of respondent s failure to notify grievant of the receipt of the settlement check as a "technical" violation of RPC 1.15(b) ignores respondent's obvious self motivation. Respondent's failure in this regard ultimately enabled him to commit his misconduct, unencumbered by grievant's objections. It was a calculated means to an end. Had respondent notified grievant of his receipt of the settlement check, she undoubtedly would have refused her endorsement, absent a final resolution of the fee dispute. Respondent's circumvention of that procedure put grievant in the position of having to take affirmative steps to attempt to recoup the funds to which she believed she was entitled. Under those circumstances, the Board does not find credible respondent's testimony that the deposit of the settlement draft without grievant's endorsement was the result of existing office procedure, as opposed to design to bypass the requirement that grievant endorse the check.

Furthermore, the DEC's conclusion that respondent's failure to obtain grievant's endorsement on the settlement check, standing alone, did not constitute an ethics violation at the time of its occurrence represents a misunderstanding of the relevant caselaw. In making that observation, the DEC relied on In the Matter of Advisory Committee on Professional Ethics Opinion 635, 125 N.J. 181 (1991), which ruled improper the use of a form procedure extending a power of attorney to the lawyer to endorse a client's name to a settlement draft, except in extraordinary circumstances. Since that matter was decided by the Court on July 25, 1991, five months

after respondent stamped the check for deposit without obtaining grievant's endorsement, the DEC determined that respondent's conduct in this regard was as yet unproscribed. That ACEP opinion, however, is inapplicable here as it deals with the attorney's routine procurement of a power of attorney to endorse the client's name to the settlement check. Instead, this failure to obtain grievant's endorsement on a settlement check prior to his deposit of that check. Clearly, that conduct, especially in the face of a specific request by grievant that she be notified of receipt of the check, violated the Court's stated policy to protect the interest of all concerned by prohibiting any procedure that routinely confers upon the attorney the power to endorse settlement checks in behalf of clients. See, e.g., In re Conroy, 56 N.J. 279 (1970). While the Conroy case dealt with a form retainer agreement containing a power of attorney clause for the endorsement of all settlement checks, the policy enunicated there is no less applicable to this matter.

The only issue remaining is the appropriate measure of discipline for respondent's ethical violations. An attorney's failure to obtain the client's consent to the removal of legal fees in the face of a fee dispute ordinarily merits a private reprimand. Here, however, there are several aggravating factors militating against private discipline. First and foremost, respondent's action in stamping the back of the check was designed to detour the endorsement requirements. One cannot but conclude that his actions were the result of design to gain advantage in this fee dispute. It cannot be said that respondent

was not aware of the proper procedure - he was. He followed it with regard to grievant's prior attorney's fee. In addition, once grievant notified respondent that she expected him to correct his improper disbursement of his disputed fee, he agreed to do so only if she returned the net proceeds of the settlement to which she was clearly entitled and which were not in dispute. Respondent's strong-arm tatic to intimitate grievant into abandoning her objection to his fee and his improper disbursement to himself cannot be condoned. Also, respondent's improper conduct was aimed at self-enrichment. Lastly, it seems that to date, respondent has not replaced and segregrated the disputed funds or has otherwise attempted to make his client whole.

In light of the foregoing aggravating circumstances, the Board unanimously recommends that respondent be publicly reprimanded. In making this recommendation, the Board considered respondent's previously untarnished record of twelve years and his cooperation with the DEC. Two members did not participate.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

by "s/ Raymond Tromadore"
Raymond Tromadore
Chair
Disciplinary Review Board

dated 8/28/94